

United States District Court
For the Northern District of California

1 OSCAR GATES,

2 Petitioner,

3 v.
4 RON DAVIS, Acting Warden,
5 Respondent.

6 _____ /

7 **ORDER RE CLAIMS 13, 15, 25, 26
AND 28 AND RE RESPONDENT'S
MOTION TO STRIKE**

8 **INTRODUCTION**

9 Petitioner Oscar Gates was convicted in 1981 of, *inter alia*, murder (Cal. Penal Code
10 187(a)), accompanied by the robbery-murder special circumstance (Section 190.2 (a)(17)(A)),
11 two counts of robbery (Section 211), assault with a deadly weapon (Section 245(a)), possession
12 of a firearm by an ex-felon (Section 12021), and escape (Section 4532(b)). He now seeks a writ
13 of habeas corpus under 28 U.S.C. Section 2254, and the parties have briefed five claims in the
14 petition. In addition, respondent has moved to strike the declaration of investigator Russell
15 Stetler, which petitioner submitted with his reply brief. For the following reasons, Claims 15
16 and 28 are **DENIED**. Claims 13 and 26 are **DEFERRED**. Claim 25 is **DENIED** in part and
17 **DEFERRED** in part. Respondent's motion to strike is **GRANTED**.

18 .
19 **FACTUAL BACKGROUND**

20 On December 10, 1979, Maurice Stevenson and his uncle, Lonnie Stevenson, were

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1 waxing his car in front of his grandfather's house in Oakland at about 3:30 p.m. Petitioner
2 appeared, holding a gun with the hammer cocked. Petitioner herded Maurice and Lonnie to the
3 side of the house and ordered them to put their hands on the wall, empty their pockets, and
4 remove their jewelry. After Maurice and Lonnie complied with petitioner's directives,
5 petitioner frisked them and asked Maurice as to the whereabouts of Maurice's father, James
6 Stevenson. Maurice replied that he did not know and petitioner told them that he was going to
7 kill them. Petitioner first shot Lonnie, who yelled for his father and started running toward the
8 back of the house, then shot Maurice, picked up the money and some of the jewelry, and fled.
9 Lonnie died but Maurice survived. Some time after the shooting, petitioner called Jimmy
10 Stevenson, Maurice's grandfather, and said that he had killed Lonnie and shot Maurice, that he
11 was going to Los Angeles to kill members of another family, and that when he returned he
12 would finish killing off the Stevenson family. On December 29, 1979, petitioner was arrested
13 in Vallejo, and the gun later determined to be the one that killed Lonnie Stevenson was found
14 on
15 him. *See People v. Gates*, 43 Cal.3d 1168, 1176-78 (1987).

16 On January 4, 1980, an indictment was filed in Alameda County. It charged petitioner
17 with murder (Cal. Penal Code § 187(a)), accompanied by the robbery-murder special
18 circumstance (§ 190.2 (a)(17)(A)), two counts of robbery (§ 211), assault with a deadly weapon
19 (§ 245(a)), possession of a firearm by an ex-felon (§ 12021), and escape (§ 4532(b)), among
20 other things. Petitioner pled not guilty to all charges. The trial began on March 16, 1981.
21 At trial, petitioner asserted a claim-of-right defense. He testified about a so-called
22 "Stevenson family forgery ring," purportedly headed by James Stevenson and Donald "Duck"
23 Taylor, and of which, Lonnie and Maurice Stevenson, Melvin Hines and petitioner were all
24 members. A dispute arose when petitioner did not receive his "big cut" of \$25,000 allegedly
25 promised to him.

26 Trial testimony also revealed that, in September 1979, a heated argument between
27 petitioner and other members of the forgery ring led to petitioner being fired upon by Maurice
28 and James Stevenson, which resulted in a gunshot wound to petitioner's leg. Thereafter,

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1 petitioner learned through intermediaries that he would have to give up his claim to the money or
2 he would be shot.

3 On December 10, 1979, petitioner allegedly spoke with Lonnie Stevenson by phone and
4 made arrangements to pick up the money at Jimmy Stevenson's house at about 3:00 p.m.
5 Petitioner went to Jimmy Stevenson's house as had been arranged. Petitioner saw Maurice and
6 Lonnie outside waxing a car. Petitioner allegedly told Maurice and Lonnie that he was there to
7 pick up his money and did not want any trouble, but that he had a gun and could take care of
8 himself. As the three men made their way around the side of the house, petitioner's suspicion
9 was allegedly aroused by some of Maurice and Lonnie's actions, so he patted them down for
10 weapons. After finding none, the three men continued toward the back of the house when
11 petitioner saw Jimmy Stevenson holding a gun. Gunfire erupted. Lonnie and Maurice were
12 shot, and petitioner fled. On May 6, 1981, the jury convicted petitioner of all charges and found
13 the special circumstance allegation to be true.

14 At the penalty phase, the prosecution presented, as evidence in aggravation, evidence of
15 petitioner's convictions for robbery and for two assaults in connection with a 1978 robbery of a
16 McDonald's restaurant, a 1973 conviction for rape, and a 1973 conviction for kidnapping. The
17 prosecution also presented evidence that petitioner was involved in a 1978 assault and robbery
18 of two women at a Los Angeles mortuary, which had resulted in the death of one of the women.
19 Petitioner was later convicted of the Los Angeles mortuary crimes in a separate trial.

20 The case in mitigation consisted of testimony by several of petitioner's family members,
21 several apartment neighbors, and a clinical psychologist. Petitioner's family members described
22 the racially-segregated environment in which petitioner grew up in Belzoni, Mississippi. They
23 testified that petitioner was never in any trouble until an incident at a Western Auto Store when
24 he was approximately 14 to 16 years old; the incident, which apparently involved petitioner, an
25 African-American, striking a white woman who had struck him first, resulted in petitioner
26 spending six months in jail and becoming a target of police harassment and suspicion for any
27 problem that arose thereafter. Petitioner's mother also testified that she visited petitioner in
28 California in 1973 at a jail hospital after he had been beaten by the police. Petitioner's

1 neighbors described petitioner as a friendly, sweet, considerate, good-hearted, good-natured
2 person who never got angry and got along well with people. Dr. Paul Berg, a clinical
3 psychologist, testified that petitioner was “an unusually well-adjusted prisoner” and most likely
4 would not present a problem in prison. *See Gates*, 43 Ca1.3d at 1193-97. On May 28, 1981, the
5 jury returned with a verdict of death for petitioner.

6 **PROCEDURAL BACKGROUND**

7 The California Supreme Court affirmed petitioner's conviction and sentence on direct
8 appeal on October 15, 1987. *People v. Gates*, 43 Ca1.3d 1168 (1987). On May 23, 1988, the
9 United States Supreme Court denied a petition for certiorari. *Gates v. California*, 486 U.S.
10 1027 (1988).

11 Subsequent state and federal habeas proceedings ensued, with a focus on, *inter alia*,
12 petitioner's competency.¹ After much litigation, this matter was stayed in 2004 following an
13 adjudication of petitioner's mental incompetency, as required by *Rohan ex. rel. Gates v.*
14 *Woodford ("Gates")*, 334 F.3d 803 (9th Cir. 2003).² At that time, attorneys for petitioner and
15 respondent agreed that petitioner was incompetent to assist counsel. On January 8, 2013, the
16 Supreme Court decided *Ryan v. Gonzales*, abrogating *Gates* and holding that an incompetent
17 capital prisoner has no right to an indefinite stay of habeas proceedings. 133 S. Ct. 696, 706-
18 709. The Supreme Court further held that while the decision to grant a temporary stay is within
19 the discretion of the district court, an indefinite stay is inappropriate if there is no reasonable
20 hope the petitioner will regain competence in the foreseeable future. *Ibid.*

21 Pursuant to *Ryan*, this Court lifted the stay. The parties were referred to settlement
22 proceedings with Magistrate Judge Beeler; the settlement proceedings were inconclusive. In
23 addition, the Court ordered proceedings on the merits of petitioner's federal habeas proceedings
24 to re-commence, and subsequently addressed numerous claims on the merits (Dkt. No. 715).

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27 ¹ For a detailed description of the state habeas proceedings, *see Order Re Motion For Summary
Judgment on Claim 1 and 1292(b) Certification*, filed August 23, 2001.

28 ² Petitioner was also adjudicated to be mentally incompetent in 1994, as part of the proceedings in this
habeas matter, and in 1973, in a prior state criminal matter.

1 Recognizing that petitioner's competency was still at issue, the Court appointed independent
2 expert Dr. Jessica Ferranti to examine petitioner (Dkt. No. 740). Dr. Ferranti concluded that, as
3 the result of mental disorder, petitioner is incompetent, *i.e.* that he does not have the capacity to
4 make rational choices with respect to his Court proceedings or to communicate rationally with
5 his attorneys (Ferranti Report at 16-18). Both sides agreed that petitioner is incompetent. Under
6 *Gonzales*, 133 S. Ct. at 706-09, however, that is no longer grounds to stay the matter indefinitely.
7 Petitioner subsequently filed a motion to stay pending compulsory restoration proceedings; the
8 Court denied petitioner's motion and ordered consideration of petitioner's claims on the merits
9 to continue (Dkt. No. 775).

10 **LEGAL STANDARD**

11 The habeas statute authorizes this Court to review a state court criminal conviction "on
12 the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of
13 the United States." 28 U.S.C. § 2254(a).³ The purpose of the writ of habeas corpus is to
14 "protect[] individuals from unconstitutional convictions and . . . to guarantee the integrity of the
15 criminal process by assuring that trials are fundamentally fair." *O'Neal v. McAninch*, 513 U.S.
16 432, 441 (1995); *see also Brecht v. Abrahamson*, 507 U.S. 619, 632-33 (1993). Because federal
17 habeas review delays finality and burdens state-federal relations, habeas doctrines must balance
18 the protection from unlawful custody the writ offers against the "presumption of finality and
19 legality" that attaches to a state-court conviction after direct review. *See Brecht*, 507 U.S. at
20 635-38; *McCleskey v. Zant*, 499 U.S. 467, 490-91 (1991). Accordingly, a federal habeas court
21 must in most cases presume that state court findings of fact are correct. 28 U.S.C. § 2254(d). In
22 contrast, purely legal questions and mixed questions of law and fact are reviewed *de novo*. *See*
23 *Swan v. Peterson*, 6 F.3d 1373, 1379 (9th Cir. 1993), *cert. denied*, 513 U.S. 985 (1994). In such
24 circumstances, and when the state court has made no factual findings regarding the claim at
25 issue, petitioner bears the burden of proving, by a preponderance of the evidence, the facts
26 necessary to support his claims. *See, e.g., Garlotte v. Fordice*, 515 U.S. 39, 46-47 (1995).

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28 ³ This case predates the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and thus AEDPA's standard of review does not apply.

Even if a petitioner meets the requirements of Section 2254(d), habeas relief is warranted only if the constitutional error at issue had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht*, 507 U.S. at 638. Under this standard, petitioners "may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Id.* at 637 (citing *United States v. Lane*, 474 U.S. 438, 439 (1986)).

ANALYSIS

1. CLAIM 13

In Claim 13, petitioner alleges that his trial counsel was ineffective, at both the guilt phase and penalty phase of trial.

The Sixth Amendment guarantees the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, petitioner must show both that counsel's performance was deficient and that the deficient performance prejudiced petitioner's defense. *Id.* at 688. To prove deficient performance, petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Ibid.*; see also *Bobby v. Van Hook*, 558 U.S. 4, 9-10 (2009) (*per curiam*) (noting that guidelines, such as those promulgated by the American Bar Association, purporting to establish what reasonable attorneys would do may be helpful but are not the test for determining whether counsel's choices are objectively reasonable). This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. See *Strickland*, 466 U.S. at 687-88.

To prove counsel's performance was prejudicial, petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A petitioner must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 688. The test for prejudice is not outcome-determinative, i.e., defendant need not show

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1 that the deficient conduct more likely than not altered the outcome of the case; however, a
2 simple showing that the defense was impaired is also not sufficient. *Id.* at 693.

3 The *Strickland* prejudice analysis is complete in itself. Therefore, there is no need for
4 additional harmless error review pursuant to *Brecht*. See *Musladin v. Lamarque*, 555 F.3d 830,
5 834 (9th Cir. 2009); *Avila v. Galaza*, 297 F.3d 911, 918 n.7 (9th Cir. 2002).

6 With regards to the guilt phase, petitioner primarily argues that his trial counsel failed to
7 investigate, present evidence, or seek relevant jury instructions regarding petitioner's mental
8 state at the time of the crimes. In addition, petitioner argues that his counsel was ineffective in
9 attempting to present a "claim of right" defense. With regards to the penalty phase, petitioner
10 primarily argues that his trial counsel failed to investigate and present at the penalty phase
11 extensive mitigation evidence, including evidence pertaining to petitioner's educational,
12 psychological, medical, institutional, cultural and social histories. In capital cases, the Supreme
13 Court has confirmed that counsel has a duty to conduct a "thorough investigation of the
14 defendant's background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

15 Petitioner requests that resolution of this claim be deferred for two reasons. First,
16 petitioner argues that Claim 13 should be deferred until petitioner regains competency. Because
17 this Court has already denied petitioner's motion for a stay pending compulsory restoration
18 proceedings, the request for deferral on this ground is denied.

19 Second, petitioner requests deferral because Claim 13 specifically refers to and relies on
20 previous claims in the petition, in particular Claim 2, which alleges that petitioner was denied
21 access to and assistance of competent mental health examiners (Second Amd. Pet. at 31).
22 Petitioner has also stated that he plans to move for an evidentiary hearing on this and other
23 claims. While this Court will not opine at this juncture as to whether petitioner will be able to
24 demonstrate that he is entitled to an evidentiary hearing, the Court does recognize that because
25 this is a pre-AEDPA action, the factual and legal issues must generally be decided *de novo*, and
26 without the evidentiary restrictions imposed on post-AEDPA matters by decisions such as *Cullen*
27 *v. Pinholster*, where the Supreme Court held that "review under § 2254(d)(1) is limited to the
28 record that was before the state court that adjudicated the claim on the merits." 131 S. Ct. 1388,

1 1398 (2011).

2 Accordingly, the Court acknowledges, as it must, that petitioner is entitled to at least bring
3 a motion for an evidentiary hearing prior to this Court's resolution of certain claims on the merits.
4 Additionally, the Court agrees with petitioner that even if the Court does not grant relief or hold
5 an evidentiary hearing on this or the preceding claims in the petition, it must defer decision on
6 this claim until the earlier claims upon which this claim specifically relies are litigated.

7 Therefore, resolution of Claim 13 is **DEFERRED**.

8 **2. CLAIM 15**

9 In Claim 15, petitioner maintains that the trial court erred in refusing to re-voir dire the
10 jury after the guilt phase of his trial. According to petitioner, failure to do so deprived him of his
11 rights to, *inter alia*, a fair trial, trial by an impartial jury, due process and cruel and unusual
12 punishment, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

13 **A. FACTUAL BACKGROUND**

14 After the jury returned its verdict at the guilt phase of the trial on May 6, 1981, and before
15 the penalty phase was scheduled to begin, petitioner's trial counsel moved the court to *re-voir*
16 *dire* the jury. This request was based on trial counsel's belief that the jury was biased against
17 petitioner because of several unusually high profile events generating ample media attention
18 concerning the death penalty, that occurred during the guilt phase of petitioner's trial.

19 On May 14, 1981, the trial court conducted a hearing regarding trial counsel's request to
20 *re-voir dire* the jury (RT 994-1000). Petitioner's counsel referred to several newsworthy events
21 in support of his motion to *re-voir dire* the jury. The day before this hearing, on May 13, 1981,
22 there was an assassination attempt on Pope John Paul II. A few months prior to the hearing, on
23 March 30, 1981, there was an assassination attempt on President Ronald Reagan. The
24 prosecution of the "Hillside Strangler," the serial killer duo responsible for the murders of several
25 women in Southern California , also occurred in 1981 (RT 995). In addition, petitioner's trial
26 counsel submitted several then-current newspaper articles regarding the death penalty: (1) an
27 article on a murder conviction which was reduced to manslaughter by a judge on the Alameda
28 County Superior Court bench; (2) an article in which then-Chief Justice Burger "blasts" death

1 penalty delays; and (3) an article referring to a dissent by Justice Rehnquist with the headline
2 “Quicker Death Penalty Urged by Rehnquist” (RT 996). Trial counsel argued that this blitz of
3 media attention surrounding the death penalty could be causing jurors to more readily impose the
4 death penalty on petitioner. To support this claim, trial counsel pointed to a juror, who at the
5 close of the guilt phase of the trial, asked the bailiff: “Do we start the penalty phase?” (RT 990).
6 Trial counsel argued that the juror’s statement demonstrated that the jurors had pre-judged the
7 case, thus necessitating additional *voir dire*. *Id.* The trial court denied trial counsel’s request to
8 *re-voir dire* the jury, finding that it was unnecessary (RT 991). The same jury then proceeded to
9 the penalty phase of the trial, where it sentenced petitioner to death.

10 **B. ANALYSIS**

11 Petitioner claims his constitutional rights were violated when the trial court did not allow
12 him to *re-voir dire* the jury after media attention regarding the death penalty occurred between the
13 guilt phase and penalty phase of his trial. Petitioner argues that the trial court’s denial of his
14 request resulted in Fifth, Sixth, and Eighth Amendment violations.⁴

15 As an initial matter, federal review in interpreting the constitutional provisions as they
16 apply to *voir dire* proceedings in state court is limited. *Mu’Min v. Virginia*, 500 U.S. 415, 424
17 (1991). The Supreme Court has explained “the adequacy of *voir dire* is not easily subject to
18 appellate review.” *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Therefore, “the
19 trial court retains great latitude in deciding what questions should be asked on *voir dire*.”
20 *Mu’Min*, 500 U.S. at 424. Nonetheless, two main topics during *voir dire* of prospective jurors are
21 well-established Fourteenth Amendment concerns: racial prejudice and opinions on capital
22 punishment. *See Aldridge v. United States*, 283 U.S. 308 (1931); *Morgan v. Illinois*, 504 U.S.
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26 ⁴ To the extent that petitioner is challenging the practice of using the same jury for the guilt phase and
27 penalty phase of his trial, there is no merit to that claim. The Supreme Court has emphasized that there is not
28 one right way for a State to set up its capital sentencing scheme. *Morgan v. Illinois*, 504 U.S. 719 (1992) (*citing*
Spaziano v. Florida, 468 U.S. 447, 464, (1984)). In addition, the practice of using the same jury for the guilt
phase and the penalty phase of the trial is a well-accepted practice, instituted in California by legislative
preference. Cal. Penal Code § 190.4(c).

1 719 (1992).⁵ Respondent argues that these are the only two inquiries that are constitutionally
2 compelled. Although these are the two most prevalent claims, the Supreme Court has not held
3 that these are the only available constitutional challenges to *voir dire* proceedings in the federal
4 courts. *See Mu'Min*, 500 U.S. at 424. Claims challenging a state trial court's *voir dire* for other
5 reasons have also been raised and evaluated in federal courts. *See Mu'Min*, 500 U.S. at 415;
6 *Skilling v. United States*, 561 U.S. 358 (2010).

7 Despite the variety of claims regarding *voir dire* procedures, there is no established
8 federal precedent for the specific issue raised by petitioner, namely, a request to *re-voir dire* a
9 jury panel between the guilt phase and penalty phase of the trial based on current events.
10 Therefore, previous cases dealing with constitutional challenges to other *voir dire* issues are
11 instructive in this situation. Petitioner's claim is most analogous to claims regarding pretrial
12 publicity causing an unfair trial. Although pretrial publicity cases typically concern media
13 attention about that particular case, petitioner is essentially raising the same argument: media
14 attention potentially caused the jury to be biased.

15 The Supreme Court analyzed a similar challenge regarding a state court's refusal to ask
16 specific questions at *voir dire* about pretrial publicity. In *Mu'Min v. Virginia*, the Supreme Court
17 rejected a defendant's claim that the trial judge erred by not allowing specific questions to
18 potential jurors about the pretrial publicity surrounding his murder trial. There, the petitioner was
19 an inmate serving time for first-degree murder who committed another murder while out of prison
20 on work detail. *Mu'Min*, 500 U.S. at 415. The case engendered substantial publicity in the local
21 news media but the trial judge denied Mu'Min's motion for individual *voir dire* and refused to ask
22 any questions relating to the content of news items that potential jurors might have seen or read.
23 *Id.* Mu'Min argued that the trial court's failure to ask specific questions about the content of what
24 pretrial publicity potential jurors were exposed to regarding the case violated his Fourteenth

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26 ⁵In *Aldridge*, the Supreme Court held that it was reversible error for a court not to have asked whether
any jurors might be prejudiced against a defendant because of his race. *Aldridge*, 238 U.S. at 311.
27 Additionally, in *Morgan*, the Supreme Court held that the impartiality required in the Due Process Clause of the
Fourteenth Amendment allowed a capital defendant to challenge for cause any prospective juror who would
automatically vote for the death penalty in every case in which a defendant is found guilty. *Morgan*, 504 U.S. at
729.

1 Amendment rights. *Id.* The Supreme Court disagreed, and held that to constitute a due process
2 violation, the trial court's failure to ask these questions must have rendered the defendant's trial
3 fundamentally unfair. *Id.* at 425-26. The Supreme Court further explained that "our own cases
4 have stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of
5 pretrial publicity and in other areas of inquiry that might tend to show juror bias." *Id.* at 427.
6 Therefore, the essential question at issue here, keeping in mind the wide discretion a reviewing
7 court must accord to a trial court, is whether the *voir dire* process made petitioner's trial
8 fundamentally unfair such that it violated petitioner's Sixth Amendment right to an impartial jury,
9 and his Fourteenth Amendment right to due process.

10 The trial court's decision to decline trial counsel's request to *re-voir dire* the jury did not
11 violate petitioner's Sixth or Fourteenth Amendment rights. As explained above, the Supreme
12 Court has held that defendants are entitled to inquire into potential juror's views on the death
13 penalty; otherwise, there is a due process violation. *See Morgan*, 504 U.S. at 729. This
14 requirement was thoroughly satisfied at the initial *voir dire*, a fact that petitioner does not dispute
15 (Dkt. 742 at 21). Both the trial judge and petitioner's defense counsel questioned prospective
16 jurors about their attitude toward the death penalty during the first *voir dire*. In particular, the
17 court asked all of the prospective jurors whether they had read books, magazine articles,
18 pamphlets, or newspaper articles that affected their opinion of the death penalty. Additionally,
19 the court specifically asked the potential jurors if they had heard current media publicity about the
20 death penalty. This extensive questioning allowed the parties a chance to determine whether
21 prospective jurors would be impartial and objectively evaluate the evidence. *See Rosales-Lopez*,
22 451 U.S. at 188.

23 Nonetheless, petitioner argues that the "sensational and inflammatory events" that
24 occurred after this initial *voir dire* required the judge to grant defense counsel's request to inquire
25 into the jury's opinions for a second time. Petitioner argues that the trial judge's denial of this
26 request violated petitioner's right to a fair and impartial jury. This argument is unpersuasive.
27 Although the attempted assassinations and news coverage regarding the death penalty were
28 certainly noteworthy events, there is no direct evidence that this media environment had an effect

1 on any of the jurors. In fact, there appears to have already been substantial media controversy
2 over the death penalty at the beginning of the trial, because the trial judge asked potential jurors
3 about the subject at the initial *voir dire*. Specifically, the trial judge asked one juror: “Obviously
4 in the media now there is a lot of publicity about crime and in particular the death penalty, in fact
5 the Steven Judy execution fairly recently. Have you paid any attention or done any serious
6 reading in that area?” (15 RT A-195). Many jurors had not paid attention to the media
7 controversy surrounding the death penalty and any jurors that had reservations about their ability
8 to be fair were discharged from the panel (15 RT A-235).

9 The only specific evidence that petitioner brings forward to show bias is one juror’s
10 question: “Do we start the penalty phase?” (RT 990). This is neither direct evidence that the
11 jurors were impartial, nor that petitioner received an unfair trial. Importantly, the trial judge did
12 not seem to think this comment indicated any bias in the jury. The trial judge explained “I think
13 it is not indicative of anything other than just to ascertain the calendering” (RT 990). Therefore,
14 at the hearing for trial counsel’s request, the trial judge decided a second *voir dire* was
15 unnecessary, specifically noting: “I don’t see what there is to *voir dire*. Obviously there is no
16 impropriety. Your motion is denied as well as your motion for a second jury” (RT 991).

17 This ruling is entitled to a great deal of deference by this Court. The Supreme Court has
18 found that a trial judge is in the best position to evaluate jurors because he or she has the best
19 opportunity to observe their demeanor and response to questions. *Rosales-Lopez*, 451 U.S. at
20 188. For this reason, the Supreme Court has explained that an appellate court cannot easily
21 second-guess the conclusions of the decision-maker who observed the jury. *Id.* And absent
22 substantial indications of bias, when ruling on a defendant’s request to examine the jury about a
23 specific subject, “the Constitution leaves it to the trial court, and the judicial system within which
24 that court operates, to determine the need for such questions.” *Id.* at 190. Without direct and
25 specific evidence of a biased jury, which petitioner cannot establish, we must defer to the trial
26 judge’s evaluation that a second *voir dire* was unnecessary. Accordingly, Claim 15 must be
27 **DENIED.**

28 3. CLAIM 25

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1 In Claim 25, petitioner maintains that he is factually innocent of the crimes for which he
2 was convicted. In addition, Claim 25 contains what appears to be a “cumulative error” claim,
3 alleging that his conviction was obtained in violation of various rights that are the subject of other
4 claims in the petition.

5 To the extent that petitioner is bringing a cumulative error claim, it must be deferred. In
6 some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the
7 cumulative effect of several errors may still prejudice a defendant so much that his conviction
8 must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir. 2003) (reversing
9 conviction where multiple constitutional errors hindered defendant’s efforts to challenge every
10 important element of proof offered by prosecution). Here, however, no trial error has been found
11 in the claims considered thus far by the Court. Petitioner’s claim for cumulative error will
12 therefore be addressed after consideration of the other claims in the petition.

13 As to his claim of factual innocence, petitioner maintains both that he did not commit the
14 crimes alleged and that, as a result of mental disease or defect, he could not form the requisite
15 intent to kill. The Supreme Court, however, has never held that a freestanding claim of actual
16 innocence may serve as a basis for a grant of habeas relief, even in capital cases. *Herrera v.*
17 *Collins*, 506 U.S. 390, 400 (1993). Rather, “[c]laims of actual innocence based on newly
18 discovered evidence have never been held to state a ground for federal habeas relief absent an
19 independent constitutional violation occurring in the underlying state criminal proceeding.” *Ibid.*

20 In addition, even if the Supreme Court had established that freestanding claims of actual
21 innocence are cognizable on federal habeas, petitioner has not made any compelling allegations,
22 or cited to any meaningful evidence, in support of the claim that he was not actually the
23 perpetrator of the crimes, particularly as petitioner himself testified at trial that he was the
24 shooter, but maintained that he was acting in self-defense and in an attempt to retake property.
25 Petitioner’s counsel suggests that such evidence may be available from petitioner, if he is returned
26 to competency and can communicate with his attorneys. As this Court has already held, however,
27 there is no reasonable likelihood that petitioner will be returned to competency, and thus litigation
28 of his habeas petition must continue. *Ryan v. Gonzales*, 133 S. Ct. 696, 709 (2013). Accordingly,

1 this portion of petitioner's claim is **DENIED**.
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3 **4. CLAIM 26**

4 In Claim 26, petitioner maintains that the death verdict against him is constitutionally
5 unreliable and deprived him of his rights to due process, heightened capital case due process, and
6 heightened capital case reliability in fact-finding and sentencing. Specifically, petitioner alleges
7 that the death sentence was not imposed based on an individualized determination of whether he
8 should be put to death, but rather was based on inaccurate, incomplete and unreliable evidence.

9 Petitioner requests that resolution of this claim be deferred for two reasons. First,
10 petitioner argues that Claim 26 should be deferred until petitioner regains competency. Because
11 this Court has already denied petitioner's motion for a stay pending compulsory restoration
12 proceedings, the request for deferral on this ground is denied.

13 Second, petitioner points out that this claim specifically references and relies on previous
14 claims in the petition. Specifically, Claim 26 states that:

15 The facts supporting this claim are set forth, *ante*, and
16 incorporated by reference, in all of the foregoing claims, including
17 but not limited to, *inter alia*, the claims concerning mental illness
and incompetency, the *Brady* violations, prosecutorial misconduct,
trial counsel's ineffective assistance, the mental health experts'
failures, etc.

18 (Second Amd. Pet. at 296). Petitioner has also stated that he plans to move for an evidentiary
19 hearing on this claim. As discussed *supra*, the Court acknowledges, as it must, that petitioner is
20 at entitled at least to bring a motion for an evidentiary hearing prior to this Court's resolution of
21 certain claims on the merits. Additionally, the Court agrees with petitioner that even if the Court
22 does not grant relief or hold an evidentiary hearing on this or the preceding claims in the petition,
23 it must defer decision on this claim until the earlier claims upon which this claim specifically
24 relies are litigated. Therefore, resolution of Claim 26 is **DEFERRED**.

25 **5. CLAIM 28**

26 In Claim 28, petitioner claims that his death sentence is constitutionally disproportionate
27 to the crimes for which he was convicted, and must be reduced to life without parole. According
28

1 to petitioner, this violates his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

2 Petitioner makes several arguments in support of this claim. Each will be considered in
3 turn.

4 To begin with, petitioner argues that his crime was “a murder involving a single crime
5 partner murder victim, who died quickly from a single gun shot wound inflicted during a struggle
6 over crime proceeds.” According to petitioner, such a crime should not subject him to capital
7 punishment. Petitioner was convicted, however, of murder (Cal. Penal Code § 187(a)),
8 accompanied by the robbery-murder special circumstance (§ 190.2 (a)(17)(A)), two counts of
9 robbery (§ 211), assault with a deadly weapon (§ 245(a)), possession of a firearm by an ex-felon
10 (§ 12021), and escape (§ 4532(b)). He does not allege that those crimes do not make him eligible
11 for the death penalty under state or federal law. Rather, he maintains that if a proportionality
12 review is conducted by this Court, with an evidentiary hearing where he proposes to submit
13 factual data regarding other California capital cases, he will be able to demonstrate that similarly-
14 situated defendants did not receive a sentence of death.

15 This argument may be quickly dismissed, as there is no case or statutory law entitling
16 petitioner to a “comparative evaluation of the facts.” Petitioner relies primarily on *Kennedy v.*
17 *Louisiana*, 554 U.S. 407, 420 (2008), where the Supreme Court stated that “capital punishment
18 must be limited to those offenders who commit a narrow category of the most serious crimes and
19 whose extreme culpability makes them the most deserving of execution.” In *Kennedy*, however,
20 the Court considered whether the death penalty could be imposed for non-homicide crime of child
21 rape. *Id.* at 417-418. In holding that it was unconstitutional for child rape to be a capital offense,
22 the Court emphasized that the Eighth Amendment generally limited the death penalty as a
23 potential punishment for crimes resulting in death. *Id.* at 446-47. Nothing in the Court’s holding
24 suggested that it is appropriate or necessary for a district court to conduct a proportionality review
25 when, as here, the petitioner does not allege that the crimes for which he was convicted are not
26 capital offenses, but rather argues that other defendants in California who committed comparable
27 crimes did not receive a death sentence. The Supreme Court has previously held that there is no
28 constitutional requirement for a comparative proportionality review when “the defendant requests

1 it.” *Pulley v. Harris*, 465 U.S. 37, 50-53 (1984) (upholding California’s death penalty statute and
2 finding that it properly “limits the death sentence to a small sub-class of capital eligible cases”).
3 Furthermore, the Ninth Circuit has repeatedly held that “there is no federal constitutional
4 requirement of inter-case proportionality analysis of death sentences.” *Martinez-Villareal v.*
5 *Lewis*, 80 F.3d 1301, 1308 (9th Cir. 1996) (citing *Pulley v. Harris*, 465 U.S. 37, 43, 50-51
6 (1984)); *Allen v. Woodford*, 395 F.3d 979, 1018-1019 (9th Cir. 2005) (holding that neither due
7 process, the Eighth Amendment nor equal protection mandate proportionality review).

8 Petitioner also maintains that his mental impairments entitle him to a reduction in his
9 sentence to life without parole. Once more, petitioner’s argument is without merit. Petitioner
10 essentially urges this Court to extend the Supreme Court’s holding that mentally retarded people
11 cannot be executed (*Atkins v. Virginia*, 536 U.S. 304, 315-321 (2002)) and find that people with
12 chronic mental illness, such as petitioner, also are exempt from execution. This Court declines to
13 do so.

14 Finally, petitioner argues that the jury received faulty instructions and was not presented
15 with significant mitigation evidence. According to petitioner, if the jury was properly instructed
16 and/or presented with additional mitigation evidence, it would have imposed a sentence of life
17 without parole. As petitioner implicitly acknowledges, these are claims of instructional error and
18 ineffective assistance of counsel, not of “constitutionally disproportionate punishment,” and are
19 properly addressed via other claims in the petition. Accordingly, Claim 28 is **DENIED**.

20 **6. MOTION TO STRIKE**

21 In support of his reply brief, petitioner submitted a declaration from investigator Russell
22 Stetler. Mr. Stetler’s testimony is submitted as expert opinion regarding prevailing professional
23 norms in capital investigations, and whether or not the actions of petitioner’s trial counsel were
24 adequate under *Strickland*. Although Mr. Stetler is not an attorney, petitioner is presenting his
25 testimony as that of a “*Strickland* expert.” Mr. Stetler has previously been accepted as an expert
26 on prevailing professional norms by numerous courts, including the Northern District.
27 Respondent has moved to strike Mr. Stetler’s declaration.

28 A *Strickland* expert may properly testify regarding the relevant standard of care among

1 competent practitioners in capital cases at a given time and place. *See, e.g., Mak v. Blodgett*, 754
2 F. Supp. 1490, 1493 (W.D. Wash. 1991) (district court properly considered attorney expert
3 declarations as to standard of practice among competent practitioners in capital cases), *aff'd*, 970
4 F. 2d 614 (9th Cir. 1992); *see also, Strickland*, 466 U.S. at 688 (prevailing norms of practice . . .
5 are guides to determining what is reasonable" in a given case). Such testimony, however, is not
6 required. While Rule 702 of the Federal Rules of Evidence states that an expert "may" testify if
7 his or her specialized knowledge will aid the trier of fact in determining a specific issue, there are
8 no provisions mandating expert testimony. The Ninth Circuit has confirmed that in ineffective
9 assistance cases, expert testimony on the standard of care is not required. *La Grand v. Stewart*,
10 133 F. 3d 1253, 1270-71 & n.8 (9th Cir. 1998); *see also Bonin v. Calderon*, 59 F. 3d 815, 838
11 (9th Cir. 1995) (district court has discretion to exclude expert testimony if it will not assist the
12 court in understanding the evidence).

13 Here, the Court finds that a *Strickland* expert is not necessary. While the Court has
14 deferred ruling on petitioner's ineffective assistance of counsel claim, petitioner has not
15 demonstrated at this juncture that Mr. Stetler's testimony will be necessary to assist the Court in
16 understanding the evidence or determining any fact in issue. As the Supreme Court has
17 recognized, "prevailing norms of practice are guides" to determining reasonableness, "but they
18 are only guides." *Strickland*, 466 U.S. at 688. "No particular set of detailed rules for counsel's
19 conduct can satisfactorily take account of the wide variety of circumstances faced by defense
20 counsel or the range of legitimate decisions regarding how best to represent a criminal
21 defendant." *Id.* at 688-89. Accordingly, the Court is satisfied that it can determine whether
22 petitioner's counsel strategy was reasonable without the need for expert testimony, and
23 respondent's motion to strike is therefore **GRANTED**.

24 CONCLUSION

25 For the foregoing reasons, Claims 15 and 28 are **DENIED**. Claims 13 and 26 are
26 **DEFERRED**. Claim 25 is **DENIED** in part and **DEFERRED** in part. Respondent's motion to strike is
27 **GRANTED**. Within fifteen days of the date of this Order, the parties are **ORDERED** to meet and
28 confer, and to submit a proposed briefing schedule for petitioner's remaining **record-based**

1 claims. In other words, these should be claims that can be resolved on the record as it stands, and
2 claims that will not be the subject of petitioner's anticipated motion for evidentiary hearing. For
3 the purposes of efficiency, and in order to avoid the need for oversized briefs, the parties should
4 limit the next round of briefing to no more than ten claims, and to the extent possible, choose
5 claims that have similar factual or legal predicates.

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8 **IT IS SO ORDERED.**

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10 Dated: March 9, 2014.



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WILLIAM ALSUP
12 UNITED STATES DISTRICT JUDGE
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